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DEFAMATION: EXTENSION OF THE "ACTUAL MALICE" STANDARD TO PRIVATE LITIGANTS

Colson v. Stieg
89 Ill. 2d 205, 433 N.E.2d 246 (1982)

JAMES R. BAYER, 1984*

The success of first amendment challenges in the last two decades to the common law tort of defamation has been described as "[u]nquestionably the greatest victory won by defendants in the modern law of torts."[1] The tort of defamation, which provides a cause of action to persons whose reputations are injured as a result of oral or written statements made by others,[2] has been subject to several modifications as a result of these first amendment challenges. For a number of centuries, plaintiffs could often recover without regard to whether the defendant was at fault.[3] However, the United States Supreme Court has determined that the first amendment protects some defamatory speech, and, as a consequence, the Court has imposed a fault requirement on the tort. The Court has held that the degree of fault required depends on the type of plaintiff involved.[4]

In *New York Times v. Sullivan*,[5] the Supreme Court recognized that there is a right to criticize public officials guaranteed by the first amendment. To adequately protect this right, the Court held that the

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1. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 115 (4th ed. 1971) [hereinafter referred to as PROSSER].

2. The most common definition of defamation is given by Dean Prosser: "Defamation is an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinions against him." PROSSER, *supra* note 1, at § 115. The English common law defined libel as a publication that "robs a man of his good name, which ought to be more precious than his life." Case de Libellis Famosis, 77 Eng. Rep. 250 (1606).

3. The Star Chamber in the *Libellis* case set the precedent of strict liability which was continued in this country. Thus, under strict liability it made no difference whether the libel was true or false. 77 Eng. Rep. at 251.

4. A public official suing for defamation must show that the statements were made with knowing falsity or reckless disregard to their falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). A public figure must meet the same standard. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). A private individual must show at least negligence. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See infra* notes 38-65 and accompanying text.

5. 376 U.S. 254 (1964).

defendant is not liable for any publication about a public official unless the plaintiff can show that the defendant acted with "actual malice." The Court defined "actual malice" as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[6]

The Supreme Court later extended the *New York Times* rule to include "public figures."[7] Subsequent Court opinions led many to believe that any publication which concerned a matter of "general or public interest" would be subject to the *New York Times* rule.[8] But the Court in *Gertz v. Robert Welch, Inc.*,[9] rejected this notion. Instead it held that for private individuals, as long as states did not impose liability without fault, they could fashion their own standards of liability.[10]

The *Gertz* Court voiced substantial criticism of the use of a general or public interest test. Nevertheless, a few states adopted the test after the *Gertz* decision.[11] Illinois, however, refused to adopt the general or public interest test in the 1975 case of *Troman v. Wood*.[12] But in the recent case of *Colson v. Stieg*,[13] Illinois appears to have adopted this test in the context of a defamation action brought by a professor at a public university against an evaluation committee which denied him tenure.

This case comment will analyze the *Colson* decision in light of the constitutional standards required for defamation actions since the *New York Times* decision. Illinois decisions applying these constitutional requirements will be analyzed. It will be shown that the Illinois Supreme Court reached an unwise result by imposing the actual malice standard upon a private individual. This comment will conclude that for defamation actions involving a private plaintiff, the defense of a qualified privilege assures a proper balance between the interest of insuring free and uninhibited discussion and the interest in protecting the individual's reputation.

HISTORICAL BACKGROUND: AN OVERVIEW

At common law, there were at least four elements of a prima facie

6. *Id.* at 279-80.
7. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
8. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).
9. 418 U.S. 323 (1974).
10. *Id.* at 347.
11. *See* Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1975); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).
12. Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975).
13. 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

case for defamation. These elements were adopted by Illinois and have remained essentially unchanged. In Illinois, the plaintiff is required to prove: defamatory language on the part of the defendant;[14] the defamatory language must be of or concerning the plaintiff;[15] there must be a publication of the statement to a third person who understood it;[16] and there must be damage to the reputation of the plaintiff.[17]

A fifth element, fault on the defendant's part, has been substantially affected by United States Supreme Court decisions in the past two decades which have found first amendment protection for some defamatory speech. Prior to these cases, many states imposed strict liability upon defendants in defamation actions.[18] For example, a defendant was held liable for statements he did not intend to make at all, but which resulted from printing typographical errors,[19] and where the defendant did not intend to refer to the plaintiff or was ignorant of his existence.[20] The notion of strict liability has been rejected by recent Supreme Court decisions, with the type of plaintiff[21] involved determining the degree of fault required.

The impetus for finding that certain defamatory statements are constitutionally protected was provided more than a hundred years earlier by the establishment of a "qualified privilege."[22] In *White v. Nicholls*,[23] a group of Georgetown residents wrote a letter to the President protesting political activities of the Georgetown collector of cus-

14. *See, e.g.*, Zuckerman v. Sonnenschein, 62 Ill. 115 (1871). *See also Symposium: Libel and Slander in Illinois*, 43 CHI.-KENT L. REV. 1 (1966) [hereinafter referred to as *Libel in Illinois*]. The elements of the prima facie case were adopted from the common law of England as first established in Case de Libellis Famosis, 77 Eng. Rep. 250 (1606). For further development of how the common law developed in American case law, see Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

15. *See* McLaughlin v. Fisher, 136 Ill. 111, 24 N.E. 60 (1890).

16. *See* Miller v. Johnson, 79 Ill. 58 (1875).

17. *See* Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 213 N.E.2d 1 (1st Dist. 1965). Constitutional considerations may affect damage awards. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974), in which the Court held that a private plaintiff could not recover punitive damages unless he showed actual malice.

18. Many states adopted the notion of strict liability as advanced in the English case of Hulton & Co. v. Jones, 1910 A.C. 20. In *Jones*, the defendant newspaper published a story that described the fact that one Artemus Jones was seen with a woman, who was not his wife. The newspaper intended and believed the person in the story to be entirely fictitious, but a lawyer was named Artemus Jones. The House of Lords affirmed the decision in plaintiff's favor, holding that the defendant's innocence did not excuse it from liability.

19. In Upton v. Times-Democrat Publishing Co., 104 La. 141, 28 So. 970 (1900), a newspaper was held liable for a typographical error which turned the intended statement of "cultured gentleman" into "colored gentleman."

20. *See* Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922).

21. *See supra* note 4.

22. White v. Nicholls, 44 U.S. (3 How.) 266 (1845).

23. *Id.*

toms, Robert White, who had been appointed under a law of Congress. The Court recognized that these statements were "privileged"—that is, a person had a certain first amendment right to criticize public officials in their official capacity. By adopting a qualified privilege, the Court in effect shifted the burden of proof. In the usual libel case, the burden was on the defendant to justify or excuse the publication. Under a qualified privilege, the plaintiff would be required to show express malice[24]—the plaintiff had to prove the statement false and that probable cause to make the statement did not exist.[25]

Although the privilege in *Nicholls* was limited to a petition to a particular government official, the Court in dicta expanded the view that privileged communications could include legislative and judicial proceedings, communications made in discharge of a public or private duty, and anything written by a master in giving the character of a servant.[26] The Court also approved of a right to criticize candidates for public office who voluntarily put themselves "in issue" so far as fitness or qualifications were concerned.[27]

While the Supreme Court decision in *Nicholls* was not binding on state courts under the then existing interpretation of the Constitution,[28]

24. Up until the decision of New York Times v. Sullivan, 376 U.S. 254 (1964), the term "malice" could connote some sense of ill will towards the plaintiff, although proof of ill will was not necessary to prevail. For example, in Gilmer v. Eubank, 13 Ill. 271 (1851), the court said:

> Malice is the gist of the action of slander. But the term malice has a two-fold signification. There is malice in law as well as malice in fact. In the former and legal sense it signifies a wrongful act, intentionally done, without any justification or excuse. In the latter and popular sense, it means ill-will towards a particular person; in other words, an actual intention to injure or defame him . . . [T]hough evidence of malice may be given to increase the damages, it [is not] essential. . . .

Id. at 274-75. For further discussion of malice, see *Libel in Illinois*, *supra* note 14, at 48. *See also* C. LAWHORNE, THE SUPREME COURT AND LIBEL at 1-14 (1981) [hereinafter cited as LAWHORNE].

25. 44 U.S. (3 How.) 266, 292 (1845).

26. *Id.* at 291.

27. *Id.* at 286-89. It is important to note that this case comment focuses only upon the traditional qualified privilege of fair comment and criticism. Because the plaintiff in the *Colson* case is a professor at a public university, comment concerning his qualifications are in the "public interest." Statements concerning a private teacher's qualifications would be entitled to a qualified privilege analogous to a former employer reporting to a prospective employer the misconduct of a former employee. *See, e.g.*, Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 243 N.E. 2d 217 (1968). However, it is clear that the constitutional considerations affecting qualified privileges concern only the privilege of fair comment and criticism which is the focus of this comment.

28. The Supreme Court decision in *White* was not binding on the states because of the decision in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). In that case, the Court held that the entire Bill of Rights was intended solely as a limitation on the exercise of power by the government of the United States, and was not applicable to the states. This meant that libel decisions could not be appealed to the Supreme Court on the grounds that first amendment liberties had been abridged. However, between the Civil War and the turn of the twentieth century, some type of privilege was recognized in twenty-five of the twenty-eight jurisdictions in which appellate court decisions in public official libel suits were recorded. *See* cases cited in C. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS at 87-110 (1971) [hereinafter referred to as PUBLIC OFFICIALS].

it was often cited in state decisions. The far-reaching view of privilege served as a catalyst for change in America's civil law of libel. States began to extend some type of privilege to articles dealing with public officials and candidates. The extent of the privilege varied from state to state. The majority rule at that time limited the privilege to fair comment and criticism—misstatements of fact were not entitled to the privilege.[29] The minority extended the privilege to all nonmalicious falsehoods about public officials.[30]

Meanwhile, the Supreme Court ruled that it had the right to review state restrictions on press freedom. In *Gitlow v. New York*,[31] the Court "assumed" that freedom of speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[32] Six years later, in *Near v. Minnesota ex rel. Olson*,[33] the Court stated that its right of review was "no longer open to doubt."[34] The Court overruled a state law, stating it was unconstitutional for Minnesota to place prior restraints on the publication of libels against public officials.

By the early 1960's, the view allowing immunity for nonmalicious misstatements of fact had gained wider acceptance. Nineteen states granted a privilege for nonmalicious falsehoods about public officials, and three other jurisdictions partially subscribed to such a privilege.[35] Twenty one states limited the libel-free privilege to fair comment and

29. *See, e.g.*, Rearick v. Wilcox, 81 Ill. 77 (1876); Sweeney v. Baker, 13 W. Va. 158 (1878); Bronson v. Bruce, 59 Mich. 467, 26 N.W. 671 (1886); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Upton v. Hume, 24 Or. 420, 33 P. 810 (1893); Fitzpatrick v. Daily States Publishing Co., 48 La. Ann. 1116, 20 So. 173 (1896). By 1941, states limiting privilege to fair comment and criticism were Alabama, Arkansas, Florida, Hawaii, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Jersey, New York, North Dakota, Ohio, Oregon, South Carolina, Tennessee, Vermont, Virginia, Washington, and Wisconsin. *See* PUBLIC OFFICIALS, *supra* note 28 at 129-42.

30. *See, e.g.*, Hamilton v. Eno, 81 N.Y. 116 (1800); Palmer v. Concord, 48 N.H. 211 (1868); Marks v. Baker, 28 Minn. 162, 9 N.W. 678 (1881); State v. Balch, 31 Kan. 465, 2 P. 609 (1884), *rev'd* 171 P. 1153; Cotulla v. Kerr, 74 Tex. 89, 11 S.W. 1058 (1889). By 1941, states allowing privilege for nonmalicious falsehood included: Arizona, California, Colorado, Connecticut, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, New Hampshire, North Carolina, Pennsylvania, South Dakota, Utah, and West Virginia. It was partially subscribed to by Delaware, District of Columbia, Oklahoma, Texas, and Wyoming. *See* PUBLIC OFFICIALS, *supra* note 28, at 152-65. Thus, a publication that was not actionable in one state might be actionable in another. This posed a problem for the press because newspapers and other publications often distributed their publications in more than one state. Some commentators argued that the press, in order to become responsible, needed uniform libel laws. *See generally* LAWHORNE, *supra* note 24, at 26.

31. 268 U.S. 652 (1925).

32. *Id.* at 666.

33. 283 U.S. 697 (1931).

34. *Id.* at 707.

35. *See supra* note 30.

criticism about officials.[36] This discord among jurisdictions led one author to conclude:

> [T]he law of libel was being administered differently in different parts of the nation. . . . Obviously there was a need for uniform administration and application of the laws of libel. But this could come only with a declaration of one law for all states, and such a declaration could come only from the United States Supreme Court.[37]

That declaration of libel law uniformity came in the 1964 Supreme Court decision of *New York Times Co. v. Sullivan*,[38] which determined a constitutional minimum standard for all defamation actions brought by public officials. The *New York Times* case arose out of a civil rights demonstration in Montgomery, Alabama. The *Times* published a paid advertisement, signed by a number of prominent individuals, which complained of police misconduct in dealing with the demonstration. Sullivan, the Montgomery police commissioner, brought an action for libel, alleging that he was personally defamed as one of the persons responsible for the misconduct. There were a few minor misstatements of fact in the publication, only two of which in any way reflected on the plaintiff.[39] Alabama, however, was one of the states which limited the privilege of "fair comment" to truthful statements of fact.[40] The jury returned a verdict for the plaintiff in the amount of $500,000, which was subsequently affirmed by the state supreme court.[41]

The Supreme Court in *New York Times* reversed,[42] holding that the first amendment requires a public official to prove that the publication was made with "actual malice." The Court defined actual malice as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[43] Without such a rule, the Court said "a pall of fear and timidity would be imposed upon those who would give voice to public criticism"[44] and the media would engage in self

36. *See supra* note 29.

37. LAWHORNE, *supra* note 24, at 25.

38. 376 U.S. 254 (1964).

39. It was said that the police had "ringed" the college campus. However, they only were deployed near it in large numbers on three separate occasions. The advertisement also said that Dr. Martin Luther King had been arrested seven times. He had only been arrested four times. *Id.* at 259.

40. *See supra* note 29.

41. 273 Ala. 656, 144 So. 2d 25 (1962).

42. 376 U.S. at 279-80. The *New York Times* case was the first time the Supreme Court had ever granted certiorari to hear a libel case. For commentaries on the *New York Times* decision, see Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371 (1969).

43. 376 U.S. at 280.

44. *Id.* at 269. It should be noted that the *New York Times* case was limited to statements made about a public official in his official conduct. In Garrison v. Louisiana, 379 U.S. 64 (1964),

censorship. The *New York Times* decision, however, left lower courts uncertain as to what persons were to be considered a public official and whether "public figures," in contrast to "officials", also would be subject to the "actual malice" rule.

In 1966, the Court made its first, and most effective attempt, to define a public official. In *Rosenblatt v. Baer*,[45] the Court in setting a minimum rule on what constitutes a public official stated, "[t]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to have substantial responsibility for or control over the conduct of governmental affairs."[46]

An important expansion of the *New York Times* ruling came in 1967 in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[47] The Court found that cases brought by "public figures" were also deserving of constitutional protection.[48]

the constitutional privilege was extended to statements concerning private behavior that affected officials' public conduct.

45. 383 U.S. 75 (1966). In *Rosenblatt*, a newspaper columnist had written an article which could be interpreted to impute peculation and mismanagement to Baer, a county employee, who was the supervisor of a county-owned skiing recreation area. The Supreme Court has since made clear that merely being a public employee does not confer the status of a public official. Hutchinson v. Proxmire, 443 U.S. 111 (1978).

46. 383 U.S. at 85.

47. 388 U.S. 130 (1967).

48. The Court agreed that actions brought by public figures were deserving of constitutional protection, but members of the Court disagreed as to what the standard should be. The plurality held that recovery could only be had upon "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Chief Justice Warren's concurrence and the four dissenters argued that the actual malice standard should be used. *Id.* at 162.

The Court also gave no precise standard for defining a public figure, although it mentioned some factors as notoriety or purposeful involvement in public affairs and an ability to influence events. *Id.* at 155. Butts had been the athletic director at the University of Georgia. He claimed he was libeled in a *Saturday Evening Post* article which said that Butts had given all of Georgia's football team's secret plays to the opposing Alabama coach. The companion case involved one Walker, a retired army general. Walker had considerable political prominence in the South and had appeared on many television and radio shows. Walker claimed he was libeled by an Associated Press article which stated that Walker had assumed an active role in race riots which occurred when the University of Mississippi was forced to integrate.

Since the *Butts* case, lower courts have grappled with the task of defining a public figure. Lamented one court, "[d]efining a public figure is like trying to nail a jelly fish to the wall." Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976). It was not until the case of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that the Court tried to come up with a workable definition. The Court found that a person may be deemed a public figure on one of two grounds: (1) where he has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and contexts; or (2) where he voluntarily injects himself or is drawn into a particular public controversy, and thereby becomes a public figure for that limited range of issues. *Id.* at 351. *Gertz* also indicated that it might be possible for someone to become a public figure through no personal action of his own, but considered such instances to be "exceedingly rare." *Id.* at 345. Subsequent cases support this interpretation. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976), where the Supreme Court found that a well known woman in the community involved

Although the *Butts* decision was limited to public figures, the Court's discussion focused in large part on the "public interest" of the defamatory statements. Thus, the belief was fostered that perhaps the determinative factor to be considered in applying the *New York Times* rule was the public interest in the speech rather than the status of the individual. This belief was strengthened by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*[49]

In *Rosenbloom*, the Court upheld a lower federal court in requiring that a knowing or reckless falsehood be proved before libel damages could be obtained by a private individual who claimed he was defamed in broadcasts discussing a police campaign to enforce obscenity laws.[50] On its face, it appeared that the Supreme Court had extended the constitutional privilege of discussion which had been previously limited to public officials and public figures to include libels of private individuals that occurred in discussion of public issues. However, this was the position taken by only three justices. Five separate opinions were written and the dissent also included three justices.[51]

The plurality in *Rosenbloom* reasoned that an artificial barrier had been created in earlier decisions between "public and private" persons, which did not adequately take into consideration the public's interest in

in a highly publicized divorce proceeding, was not a public figure because she had not voluntarily thrust herself into a public controversy. Justice Rehnquist noted: "She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." *Id.* at 454. *See also* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

49. 403 U.S. 29 (1971).

50. Rosenbloom, a distributor of nudist magazines in Philadelphia, was arrested along with other newsstand operators on charges of selling obscene materials. A radio station owned by Metromedia reporting on the arrests called the persons "smut merchants," "girlie-book peddlers," and said that the books confiscated were "obscene." When Rosenbloom was later acquitted of obscenity charges, along with a ruling that the magazines were not obscene, he filed a libel action in federal district court. He claimed that his acquittal proved the books were not obscene, the statements made by the radio were false, and that the statements characterizing him as a "smut merchant" and "girlie-book peddler" were false. The jury returned a verdict for Rosenbloom in the amount of $28,000 in general damages and $750,000 in punitive damages. The judge reduced the punitive damages to $250,000. 289 F. Supp. 737 (E.D. Pa. 1968). The trial verdict was reversed by the Court of Appeals for the Third Circuit. 415 F.2d 892 (3rd Cir. 1969). The court ruled the broadcasts concerned a matter of public interest which required the *New York Times* standard to be used. *Id.* at 896. It held Rosenbloom failed to meet this standard. *Id.* at 898. The fact that Rosenbloom was not a public figure was not of "decisive importance" because the court ruled that the first amendment protects discussion of public issues. *Id.* at 896. It was this ruling which the Supreme Court's plurality opinion upheld.

51. Justice Brennan's lead opinion was joined by Chief Justice Burger and Justice Blackmun. Justice Black and Justice White concurred. Justices Harlan, Marshall, and Stewart dissented. Justice Douglas did not join in the opinion because he had been under great criticism for his liberal opinions in obscenity cases which was a peripheral issue in *Rosenbloom*. But he would have undoubtedly joined Justice Black in his view that the first amendment did not allow any recovery in libel actions against the news media. *See* LAWHORNE, *supra* note 24, at 76.

the speech involved. Thus, the Court said the time had come "forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern. . . ."[52]

In the three-year period following the *Rosenbloom* decision, seventeen states and six circuits of the United States Courts of Appeals followed the plurality opinion as the controlling law.[53] As the *Rosenbloom* dissent predicted, almost everything published was considered by the lower courts as matters of public or general interest,[54] requiring the *New York Times* standard.

The fragile alignments of the *Rosenbloom* case soon shattered in the case of *Gertz v. Robert Welch, Inc.*[55] The Court rejected the *Rosenbloom* public interest test and replaced it with a dual standard. For suits brought by public persons, the Court required use of the actual malice standard. For suits brought by private individuals, the states were free to define their own standard of liability, as long as they did not impose liability without fault.[56]

The events surrounding the *Gertz* case involved a publication by Robert Welch, founder of the John Birch Society and a long-time campaigner against communism. His magazine, *American Opinion*, carried an article which allegedly defamed Chicago attorney Elmer Gertz. The article told about the trial and conviction of a Chicago policeman who had shot and killed a Chicago youth. While Gertz had not been involved in the prosecution, the youth's family had retained Gertz in a civil action against the policeman and he had represented the youth's family at the coroner's inquest. The magazine article described Gertz as a "Leninist" and a "Communist-fronter" who was an architect of the "frame-up" against the policeman.[57] This information contained serious inaccuracies, and the managing editor of the magazine made no effort to verify the charges. The trial judge set aside a libel verdict on the basis that a public issue was involved and that Gertz failed to prove

52. 403 U.S. at 44.

53. *See* cases cited in Gertz v. Robert Welch, Inc., 418 U.S. 323, 377 n.10 (1974).

54. Within a year after the *Rosenbloom* decision, federal and state appellate courts applied the public interest standard to stories about individuals involved in electronic eavesdropping, gun fights, organized crime, sports, backpacking overseas, pollution control, quality of restaurant food, service on private bus systems, suspension from school, sale of liquor to minors, divorce proceedings, published books, housing evictions, jail escapees, political campaign work, and credit bureau practices. *See* cases cited in LAWHORNE, *supra* note 24, at 79 n. 39.

55. 418 U.S. 323 (1974).

56. *Id.* at 347.

57. *Id.* at 326.

actual malice.[58] The United States Court of Appeals for the Seventh Circuit considered the case shortly after the *Rosenbloom* decision. In light of *Rosenbloom*, the court determined that because of the "public issue" being discussed, Gertz would have to prove a knowing or reckless falsehood, which he failed to do.[59]

The Supreme Court granted certiorari in the *Gertz* case. The Court noted that the principal issue was whether a publisher of defamatory falsehoods could claim a constitutional privilege against liability where the publication concerned a private individual.[60] The question, according to the Court, was how to balance the first amendment requirements with the right of the states, under the ninth and tenth amendments, to protect the reputations of private individuals.[61] The Court reaffirmed the "actual malice" standard adopted in *New York Times* for public officials and public figures. Nevertheless, the Court noted that the "actual malice" standard resulted in a "substantial abridgement of the state law right to compensate for wrongful hurt to one's reputation."[62] Such an abridgement would not be appropriate in private person libel cases according to the Court.

The Court's rationale in *Gertz* was that private individuals are more deserving of recovery than public officials or public figures since private persons do not seek public scrutiny and do not relinquish interest in the protection of their good names. The Court also feared the inability of private people to have access to the media to combat defamatory falsehoods. The Court also was concerned that a "public issue" test would force judges to decide on an *ad hoc* basis what publications were matters of "public or general" interest.[63] Thus, the Court concluded that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[64] The case was remanded for a new trial under these standards.[65]

After the *Gertz* decision, two states decided to adopt the use of the general or public interest test to determine the use of the actual malice

58. 322 F. Supp. 997 (N.D. Ill. 1970).
59. 471 F.2d 801 (7th Cir. 1972).
60. 418 U.S. at 332.
61. *Id.* at 341.
62. *Id.* at 342-43.
63. *Id.* at 346.
64. *Id.* at 347.
65. After fourteen years in the courts, Elmer Gertz finally received a judgment in the amount of $400,000. *See* Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982).

standard.[66] Some states adopted the use of a gross negligence test.[67] But a majority of state courts only require private individuals to prove negligence on the part of the publisher.[68]

ILLINOIS DEFAMATION LAW

Since the development of defamation law was left largely to the states and the constitutional protections afforded to certain defamation actions are only minimum standards, the development of Illinois defamation law must also be considered. Before the *New York Times* decision, Illinois, like every other state, recognized a "qualified privilege" to criticize public officials and candidates.[69] However, Illinois was one of the many states which limited the privilege to fair comment and criticism and did not allow for any misstatements of fact.[70]

After the *New York Times* decision, the Illinois courts required a public official to prove actual malice before he could recover.[71] However, in 1969, the Illinois Supreme Court extended even more protection to publishers of defamatory statements by applying the *New York Times* standard to all matters of "public or general concern."[72] The court, in *Farnsworth v. Tribune Co.*,[73] held that the United States Supreme Court cases of *Butts* and *Rosenbloom* established that matters

66. *See* Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975), *cert. denied*, 423 U.S. 1025 (1975).

67. *See* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975). *See also* Ryder v. Time, Inc., 3 MEDIA L. REP. 1170 (1977).

68. *See* Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977); Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (1975); Firestone v. Time, Inc., 305 So.2d 172 (Fla. 1974), *rev'd on other grounds*, 424 U.S. 448 (1976); Retail Credit Co. v. Russell, 234 Ga. 765, 218 S.E.2d 54 (1975); Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); Wilson v. Capital City Press, 315 So.2d 393 (La. App. 1975); Forrest v. Lynch, 347 So.2d 1255 (La. App. 1977), *cert. denied*, 435 U.S. 971 (1978); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976); Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1976); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976); Phillips v. Evening Star Newspaper Co., 2 MEDIA L. REP. 2201 (D.C. Super. Ct. 1977) (decision of a single trial judge).

69. *See, e.g.*, Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919). For further discussion of the "qualified privilege" of fair comment and criticism *Libel in Illinois*, *supra* note 14, at 75-79.

70. *See, e.g.*, Rearick v. Wilcox, 81 Ill. 77 (1876).

71. *See* Proesel v. Myers Publishing Co., 48 Ill. App. 2d 402, 199 N.E.2d 73 (1st Dist. 1964).

72. Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

73. *Id.* It is interesting to note that Elmer Gertz, the plaintiff in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), represented the plaintiff.

of public interest were entitled to constitutional protection.[74] The plaintiff in *Farnsworth* was an osteopathic physician who claimed she was libeled when the *Chicago Tribune* called her, among other things, a "quack."[75] The court held that qualifications of the medical profession were an area of critical public concern and clearly qualified as a subject "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[76]

After the *Gertz* decision, the Illinois Supreme Court rejected the *Farnsworth* rationale in *Troman v. Wood*.[77] The court held that the status of the plaintiff was the determinative factor—if a private plaintiff was involved, the negligence standard would now be used.[78] In *Troman*, a newspaper article was published about a series of burglaries and other criminal activities by a gang of youths. One edition carried a photograph of a house which bore the caption: "Home of Mrs. Mary Troman. Thomas Troman testified that he is a member of the gang."[79] The complaint alleged that the article and the picture taken together, were understood by readers as meaning that the plaintiff's home served as a headquarters for the gang, and that the plaintiff was in some manner associated with the gang.[80]

In rejecting the general or public interest test, the court recognized that Illinois has a strong interest in protecting an individual's reputation.[81] The court also noted that the media itself plays a large role in determining what is a matter of public interest. Finally, the court stated that since recklessness did not include the failure to investigate, this rule would actually serve to discourage investigations.[82]

However, in *Colson v. Stieg*,[83] the court appears to have readopted the test which places reliance on the subject matter of the publication instead of the status of the plaintiff.

74. *Id.* at 291, 253 N.E.2d at 411.
75. *Id.* at 287, 253 N.E.2d at 409.
76. *Id.* at 291, 253 N.E.2d at 411 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)).
77. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).
78. *Id.* An extensive discussion of *Troman* can be found in J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS (1979) [hereinafter referred to as BARRON].
79. 62 Ill. 2d at 188, 340 N.E.2d at 294.
80. *Id.*
81. *Id.* at 194, 340 N.E.2d at 297.
82. *Id.*
83. 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

COLSON V. STIEG

Facts of the Case

The plaintiff, John Colson, had been employed by Northern Illinois University as an assistant professor in the Department of Library Science since 1975.[84] He had accepted the position with the expectation that he would be granted tenure. However, his request for promotion and tenure status was denied.[85]

The plaintiff brought suit against Lewis Stieg, chairman of the Library Science Department, charging that the defendant had published certain defamatory remarks about the plaintiff's performance of his duties. The complaint alleged that the defendant made two defamatory statements attacking the plaintiff in his profession, which were therefore alleged to be slanderous *per se*.[86] The statements allegedly made by the defendant were:

> I have information I cannot divulge which reflects adversely on John's performance as a teacher.
>
> * * *
>
> I have counseled John many times about his teaching and the documents which would prove the counseling are missing from the department files under suspicious circumstances.[87]

The first statement was allegedly made at a meeting of the Department of Library Personnel Committee assembled for the purpose of evaluating Colson's performance pursuant to his application for tenure. The second was made before the University Council Personnel Committee assembled to consider plaintiff's appeal from the Department's recommendation that he be denied tenure.[88] Neither meeting involved more than four faculty members.[89]

The trial court granted the defendant's motion to dismiss for fail-

84. *Id.* at 207, 433 N.E.2d at 247.

85. *Id.* at 207-08, 433 N.E.2d at 247.

86. Slander *per se* constitutes spoken defamation where an injury to reputation is presumed without proof of special damages. There are four common law categories of slander *per se*:

> (1) words imputing to a person the commission of a criminal offense; (2) words which impute that the party is infected with some contagious disease . . .; (3) defamatory words which impute to the party unfitness to perform the duties of an office or employment . . . or the want of integrity in the discharge of the duties . . .; (4) defamatory words which prejudice such party in his or her profession or trade . . . .

Ward v. Forest Preserve Dist. of Winnebago County, 13 Ill. App. 2d 257, 262, 141 N.E.2d 753, 755 (2d Dist. 1957). The statements about *Colson* clearly imputed unfitness to perform his employment. For further discussion of slander *per se*, see *Libel in Illinois*, *supra* note 14, at 12-24.

87. 89 Ill. 2d at 208, 433 N.E.2d at 247.

88. *Id.*

89. *Id.* at 212, 433 N.E.2d at 249.

ure to state a cause of action.[90] The appellate court[91] held that the first statement was slanderous *per se*, incapable of an innocent construction,[92] and actionable despite a qualified privilege because the plaintiff had properly alleged malice. The second statement, the court held, was capable of innocent construction and was not actionable. Since the complaint had stated a cause of action, the trial court's order was reversed in part and the case remanded for further proceedings. The Illinois Supreme Court granted leave to appeal.[93] The essential question according to the court was the degree of protection which should be afforded a faculty evaluation committee meeting. To answer this question, the court felt compelled to review the law of defamation since the *New York Times* ruling.

The Court's Reasoning

Justice Ryan,[94] writing for the majority, first determined that the statements made about a public university professor were traditionally entitled to a qualified privilege.[95] This privilege was based on the common law privilege which allowed "fair comment" on public officials, public figures and on matters of public concern.[96] The court independently recognized that a large area of the law concerning privileges had been changed by first amendment constitutional considerations.[97] It

90. The plaintiff's amended complaint was one long rambling sentence which stated: "Said statement was made by Defendant knowing it to be false, without reasonable grounds for believing it to be true, maliciously, wilfully, intentionally and without reasonable justification or excuse with the intention of destroying Plaintiff's personal and professional reputation. . . ." *Id.* at 215, 433 N.E.2d at 250. The trial court dismissed the action because the bare allegations of knowledge of falsity without underlying supporting facts were not legally sufficient. However, both the Illinois appellate court and the Illinois Supreme Court concluded that the complaint had stated a cause of action. Although the complaint was hardly "a model," the supreme court noted that the Code of Civil Procedure requires that complaints be "liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." ILL. REV. STAT., ch. 110, par. 4 (1981). Thus, the court concluded that the allegations of actual malice ("knowing it to be false") were enough to state a cause of action. 89 Ill. 2d at 215-16, 433 N.E.2d at 250-51. *See also* Coursey v. Greater Niles Township Publishing Corp., 40 Ill. 2d 257, 239 N.E.2d 837 (1968).

91. 86 Ill. App. 3d 993, 408 N.E.2d 431 (2d Dist. 1980).

92. For discussion of the innocent construction rule, *see infra* notes 134-41 and accompanying text. The illogical results created by the innocent construction rule are aptly illustrated by the second statement of the defendant, which the court found was capable of an innocent construction. The statement clearly implies that Colson had something to do with the disappearance of documents which reflected adversely on him, yet the court held it was not actionable.

93. 73 Ill. 2d R. 315(a).

94. Justices Goldenhersch, Underwood and Ward joined the majority opinion.

95. *See supra* notes 23-36 and accompanying text.

96. 89 Ill. 2d at 209-10, 433 N.E.2d at 248.

97. *Id.* at 209, 433 N.E.2d at 247-48. It is interesting to note that the court's discussion and decision concerning constitutional protections was made independently. Neither party nor the

emphasized that the *New York Times* holding had replaced the common law qualified privilege of fair comment and criticism. Citing with approval Dean Prosser's statement that there is no reason that the constitutional privilege of *New York Times* should not be extended to all matters of public concern,[98] the court stated that it had now "extended the holding of *New York Times* in that direction."[99]

The court relied primarily on its 1969 decision of *Farnsworth v. Tribune Co.*,[100] where the court had clearly held that matters of public interest triggered the constitutional privilege of *New York Times*. The court also focused on the Supreme Court's decision in *Gertz*. The court said that *Gertz* emphasized the New York *Times* holding that in order to insure the breathing space essential to the exercise of the constitutional freedoms of speech and press, the burden of proof shifted. The court said the burden was no longer on the defendant to prove the truthfulness of the utterance. Instead, the burden was now on the plaintiff to prove actual malice on the part of the defendant. Without this shift in the burden of proof, the defendant would engage in self-censorship because he would have to prove the truth of the statement.[101] The court held that the avoidance of this self-censorship was the basis of the *New York Times* and *Gertz* decisions.

The court next turned to the facts of the particular case. It stated that the primary consideration should be the importance of the subject matter to the speakers and hearers.[102] The committee was discussing the merits of a professor to decide whether he should be granted tenure at a public university. Clearly a matter of substantial importance, the need for free and uninhibited discussion without self-censorship were "compelling reasons for applying the constitutional first amendment protections of *New York Times*. . . ."[103]

The court also briefly flirted with the notion that the plaintiff might be a public official or a public figure, noting that in some cases teachers have been held to be such for purposes of applying the *New York Times* standard.[104] The court determined that it did not need to

trial or appellate courts raised the issue of the use of the *New York Times* rule. Neither party even raised the issue in their briefs to the Illinois Supreme Court.

98. *Id.* at 210, 433 N.E.2d at 248 (citing PROSSER, *supra* note 1, at § 118).

99. *Id.*

100. 43 Ill. 2d 286, 253 N.E.2d 408 (1969). *See supra* notes 72-76 and accompanying text.

101. 89 Ill. 2d at 211, 433 N.E.2d at 248.

102. *Id.* at 212, 433 N.E.2d at 249.

103. *Id.* at 213, 433 N.E.2d at 249.

104. *Id.* (citing Johnson v. Bd. of Junior College Dist. No. 508, 31 Ill. App. 3d 270, 334 N.E.2d 442 (1st Dist. 1975); Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251 (1975), *cert. denied*, 426 U.S. 907 (1976)). In *Johnson* and *Kapiloff* the plaintiffs became involved in a public controversy

decide this issue since the facts justified the conclusion that "this case clearly qualified under the *Butts* test as a subject about which information is needed or appropriate to enable the members of the committee to cope with the issues confronting them."[105] The court concluded that the self-censorship which would result without the *New York Times* standard would be a "severe limitation on the ability of the committee to perform its assigned task of evaluating performances of the personnel of the university."[106]

The court's final task was to dissuade the fears raised in *Gertz* about the use of a general or public interest test to determine the New York *Times* privilege. *Gertz* expressed concern that one reason to base the actual malice standard on the status of the individual was that public officials and public figures have a greater access to the media to combat defamatory falsehoods. The facts in *Colson*, said the court, were distinguishable. Professor Colson had an opportunity to appeal his denial to the University Council Personnel Committee. Therefore, he did have a way to combat the defamatory falsehoods.[107] The court also noted that since few people knew of the publication, the injury to the plaintiff was minor. Thus, the court would weigh two factors to determine whether the publication was entitled to constitutional protection: the extent of the publication and the importance of the information to the recipients.[108]

Concurring Opinion

Three justices concurred[109] with the majority's conclusion that the complaint stated a cause of action, but disagreed with the majority's opinion that the *New York Times* standard of actual malice should apply.

This highly critical concurrence, written by Justice Clark, faulted the majority for extending the *New York Times* rule to a defamation action between two private individuals. It noted that *Gertz* explicitly held that in suits by private figures, a standard of liability less rigorous than *New York Times* would not impermissibly abridge freedom of

on campus and therefore became a public figure. However, Professor Colson did not do anything to invite attention to himself or thrust himself into a public controversy. To consider him a public figure would clearly be erroneous.

105. 89 Ill. 2d at 213, 433 N.E.2d at 249.

106. *Id.*

107. There is no indication that this committee considered statements made during the evaluation meeting. To the contrary, most of these appeals usually reconsider the merits of the professor.

108. 89 Ill. 2d at 213, 433 N.E.2d at 249.

109. Justices Clark, Moran and Simon specially concurred.

speech and press.[110]

The concurrence stated that the plaintiff's status was the key factor in determining whether the standard should apply. On the basis of status, the plaintiff was clearly a private individual—not a public figure. He had not injected himself into a particular public controversy nor had he achieved a pervasive fame or notoriety.[111] Nor was Colson a "public official" simply because he was a public employee.[112] Therefore, there were no constitutional reasons for applying the *New York Times* rule.

The concurrence also chided the majority for its failure to apply the traditional use of a qualified privilege to this situation. It noted that the plaintiff had conceded before the appellate court that the defendant did have a qualified privilege.[113] To overcome this privilege, the plaintiff would have to prove that the defendant did not believe the truth of the defamatory matter or that he had no reasonable grounds to believe it to be true.[114] This common law rule adequately accommodated the competing interests. There would still be room for free and uninhibited discussion, but the state would still preserve its legitimate interest in protecting the reputation of the private individual. The concurrence stated that it did not think that "the United States Supreme Court's decision in this area render or were intended to render [the privilege] nugatory."[115]

Of further concern to the concurrence was the fact that the majority had not limited its decision to matters of public or general interest. The concurrence stated that the majority placed primary reliance on the importance of the subject matter of the communication to the speakers and hearers.[116] This went beyond any previously recognized limits. The concurrence concluded that no opinion of the United States Supreme Court or of the Illinois Supreme Court provided a precedent for the majority's rationale, and that the common law privilege pro-

110. 89 Ill. 2d at 217, 433 N.E. 251 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974)).

111. *See supra* notes 47-68 and accompanying text for a discussion of what constitutes a "public figure."

112. 89 Ill. 2d at 218, 433 N.E.2d at 252 (citing Hutchison v. Proxmire, 443 U.S. 111 (1979)). For a discussion of public officials, see *supra* notes 45-46 and accompanying text.

113. 89 Ill. 2d at 219, 433 N.E.2d at 252.

114. *Id.* It should be noted that in defamation actions, under a qualified privilege or a negligence standard, the plaintiff must prove that the defendant had no reasonable grounds to believe that the statements were true. *See* Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 243 N.E.2d 217 (1968) (qualified privilege); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975) (negligence).

115. 89 Ill. 2d at 219, 433 N.E.2d at 252.

116. *Id.* at 220, 433 N.E.2d at 253.

vided an adequate balance between the need for uninhibited discussion of public issues and the legitimate state interest in protecting the reputation of a private individual.[117]

ANALYSIS

Despite the *Gertz* Court's clear preference for the use of a negligence standard for private individuals, it recognized that states must be permitted the discretion to balance the needs of its citizens against the needs of the press. It allowed the states to define their own standard of liability as long as they did not impose liability without fault. The *Colson* decision is therefore judicially correct. But the court relies on outdated cases, ignores more recent precedent, and fails to recognize interests protected by the Illinois Constitution.

First, the *Colson* decision cannot be read as specifically endorsing the use of a general or public interest test. The court itself makes a feeble attempt to limit the decision, implying that if there was widespread publication to persons, the plaintiff might not have had sufficient access to means of rebuttal and then the actual malice standard might not have been used.[118] Two Illinois appellate cases also have determined that *Colson* should be limited to its particular facts.[119] However, the reasoning of the court and the cases of *Farnsworth*, *Butts* and *Rosenbloom*, upon which the court relies, all would support the general or public interest test. In fact, the *Colson* decision may go even farther. The court relies on the importance of the subject matter of the publication. Conceivably, there could be a publication that was of great importance to the speakers and hearers, but that was not in the public interest. Clearly, this should not be entitled to constitutional protection.

The *Colson* opinion virtually ignores the interest of the individual in protecting his reputation. The Supreme Court in *Gertz* recognized this interest. The *Gertz* Court held that a private individual is more deserving of recovery because he has not invited attention to himself.[120]

117. *Id.* at 219-20, 433 N.E.2d at 252-53.

118. 89 Ill. 2d at 212, 433 N.E.2d at 249.

119. *See* American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n, 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1st Dist. 1982). This case concerned statements made about the plaintiff's pet motel at a meeting of veterinarians and in a newsletter. The court stated that "[w]e are not convinced that the court in *Colson* intended to elevate all qualified privilege to constitutional stature. . . . We see no reason to extend the constitutional privilege beyond the limits drawn in *Colson*." *Id.* at 631-32, 435 N.E.2d at 1301-02. *See also* Davis v. Keystone Printing Service, Inc., 111 Ill. App. 3d 427, 444 N.E.2d 253 (2d Dist. 1982).

120. 418 U.S. at 346.

Illinois has always recognized that an individual has a strong interest in protecting his reputation. In fact, reputation is explicitly protected by the Illinois Constitution.[121] One commentary states that the Illinois attitude "has from the beginning been one of protection of the plaintiff politician at the expense of the freedom of expression of the defendant newspaper and at the expense of the right of the public to be fully informed."[122]

The *Colson* court also ignores its own clearly established precedent. The 1975 decision of *Troman v. Wood* explicitly overruled *Farnsworth*, yet *Colson* places primary reliance on *Farnsworth* and does not even mention *Troman*. Failure to rely on *Troman* is certainly understandable since it would be damaging to the majority's ultimate conclusion, but ignoring precedent does not make for sound judicial decision-making.

Problems of the Colson *Approach*

The *Colson* approach will bring about many of the uncertainties associated with the general or public interest test. The biggest problem is that the general or public interest test depends on a case by case approach. The *Gertz* case recognized that forcing judges to decide on an *ad hoc* basis what was a matter of general or public interest would be an "unwise" approach.[123] Illinois judges will again have to make this determination. Indeed, determining the importance of the subject matter of the publication may allow for more subjectivity and provides the lower courts with little guidance.

The general or public interest test is also subject to manipulation by the publishers of the statements. As the *Troman* court stated, "[w]hether a matter is one of public interest . . . depends to some degree on whether the media themselves have chosen to make it one."[124] These same concerns are raised by the *Colson* decision.

The *Colson* standard may actually dissuade the publishers of statements from making prior investigations as to the veracity of their information. In *Beckley Newspapers Corp. v. Hanks*,[125] the Supreme Court

121. For example, the Illinois Constitution of 1818 provided that fundamental rights include "enjoying and defending liberty, and acquiring, possessing, and protecting property and reputation." ILL. CONST. of 1818, art. VIII, § 1. The individual is entitled to a remedy "for all injuries and wrongs that he may receive in his person, property or character." *Id.* at § 12. The most current constitution substitutes the word "character" for "reputation." ILL. CONST., art. I, § 12.

122. *Libel in Illinois*, *supra* note 14, at 97.

123. 418 U.S. at 343.

124. 62 Ill. 2d at 196, 340 N.E.2d at 298.

125. 389 U.S. 81 (1967). The actual malice standard is an exceedingly difficult one to meet.

stated that failure to make a prior investigation did not even constitute proof sufficient to present the *question* of a knowing or reckless falsehood to the jury.[126] *Troman* recognized that this would dissuade publishers from making investigations, since by doing so they would generate evidence for a plaintiff to prove actual malice.[127] The Supreme Court has recognized that the need for uninhibited discussion of public officials and public figures was so great that the evils that might occur by lack of investigation would have to be endured. But the Court in *Gertz* determined that discussion of private individuals was not deserving of this extra constitutional protection.[128] Yet *Colson* once again gives this extra protection to defendants.

Does New York Times *and its Progeny Only Protect the Media?*

Many commentators and at least one Supreme Court Justice[129] have taken the view that the *New York Times* case and its progeny extend only to the media. Since Stieg was not a member of the media, his statements would not be constitutionally protected. All of the cases the Supreme Court has decided in the defamation area have dealt with the media. The intent of the Founders, the Court has said, was to insure a free *press* which would advance "truth, science, morality and arts in general."[130] The sweeping statements in *New York Times* have become considerably more focused in the *Gertz* and *Firestone* decisions. Increasingly, the emphasis is placed on the free press guarantee and the need of the media for protection from self-censorship. The

The plaintiff must show by clear and convincing evidence that the defendant knew of the falsity or was reckless, which is based primarily on the defendant's subjective state of mind. Therefore, recovery is rare. *See* BARRON, *supra* note 78 at § 6.26. *See also* Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1560-61 (1972).

126. 389 U.S. at 84-85.

127. 62 Ill. 2d at 196, 340 N.E.2d 298.

128. 418 U.S. at 347.

129. BARRON, *supra* note 78 at § 6.18. The position that there is a special prerogative of the press under the freedom of the press guarantee was publicly supported by Supreme Court Justice Potter Stewart. He has said that the freedom of the press clause is a "structural provision of the constitution" which extends a special protection to the media as an institution. Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 633 (1975). Justice Stewart says that the inclusion of a separate press clause in the first amendment demands that the free speech and free press cases be treated separately. The fact that the press and media are constitutionally privileged in some circumstances does not necessarily mean that a non-media defendant would be similarly privileged. It should be noted that this view has not yet been endorsed by the Supreme Court and was stated in a speech rather than in a Supreme Court opinion. They are merely added as support for the position that the Court appears to have taken. For further discussion, see Note, *Potter Stewart: An Analysis of His Views On the Press As Fourth Estate* 59 CHI.-KENT L. REV. 157 (1982).

130. Curtis Publishing Co. v. Butts, 388 U.S. at 147 (quoting "Letter to the Inhabitants of Quebec," 1 *Journals of Continental Congress*, at 108).

opinions are replete with references to the "press," the "media," and "broadcasting."[131] *Gertz* said the issue was "whether a newspaper or broadcaster" could claim the *New York Times* privilege in an action brought by a private plaintiff.[132] One author concludes:

> It is possible that the *Gertz* emphasis on press interests was inadvertent or responsive only to the particular fact pattern involved in that case. This, however, seems unlikely. . . . The *Gertz* opinion comes at a time when there is increasing inquiry into the respective roles of the free speech and free press guarantees, including statements by members of the Supreme Court. It seems unlikely that this went unnoticed by the Court.[133]

A distinction also may be made between libel and slander. Again, all the Court decisions have dealt with libel. The Court is very careful to use the word libel instead of the generic term of defamation. Certainly the broadness of the communications media was unforeseen by the founders. The extent of the injury from a libelous statement is likely to be much greater, thus perhaps, justifying a distinction between libel and slander for extending constitutional protection.

The Qualified Privilege

The biggest failure of the *Colson* court, however, is its improper interpretation of a qualified privilege. In the court's haste to avoid self-censorship, it ignores the fact that self-censorship should not occur under a qualified privilege. The *Colson* court feared that if the defendant had to prove the truth of what he said, he "would be reluctant to freely express himself on a controversial subject."[134] But this fear is unfounded because the defendant does *not* have to prove the truth of the statement when acting under a qualified privilege. The defendant must only prove that he had reasonable grounds to believe the subject matter to be true.[135] This standard, as the court recognized in *Troman*, will strike a proper balance between the need for a free speech and press versus the protection of an individual's reputation.

131. For example, the Court in *Gertz* stated: "[This standard] recognizes the strength of the legitimate state interest in compensating private individuals . . . yet shields the *press* and the *broadcast media* from the rigors of strict liability." 418 U.S. at 348 (emphasis added). *See also* Nimmer, *Is Freedom of the Press A Redundancy: What Does It Add to Freedom of Speech?* 26 HASTINGS L. J. 639, 649-50 (1975).

132. 418 U.S. at 332.

133. BARRON, *supra* note 78.

134. 89 Ill. 2d at 211, 433 N.E.2d at 248.

135. *See* Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 243 N.E.2d 217 (1968). Under the negligence standard of *Troman*, the plaintiff will have to show the same thing—that the defendant had no reasonable grounds to believe the statement to be true. 62 Ill. 2d at 197, 340 N.E.2d at 298.

Balancing the Colson *Decision*

A short time after *Colson*, the Illinois Supreme Court decided the case of *Chapski v. Copley Press*.[136] This case concerned the merits of the "innocent construction rule." This rule, used only in Illinois, required that a court hearing a libel case to interpret words as not libelous if the words could be interpreted that way.[137] The rule made Illinois a "haven for journalists."[138]

But there has been substantial criticism of the innocent construction rule since its inception twenty years ago. Under the rule, news organizations were given wide latitude. However, it also "encouraged [the media] to drop hints, which were practically libel-proof, rather than make outright accusations, which are not."[139] The rule resulted in what one commentator called "remarkable judicial acrobatics," as courts strain to "see no evil" in statements seemingly defamatory on their face.[140]

The court in *Chapski* recognized the inequities of the rule and modified it. The new rule requires a reasonableness standard—if words may reasonably be interpreted to be innocent, they are non-actionable.[141] The *Chapski* court recognized that "modification of the innocent construction rule would better serve to protect the individual's interest in vindicating his good name and reputation, while allowing the first amendment guarantees that 'breathing space' essential to their fruitful exercise."[142]

With the *Colson* and *Chapski* decisions, the Illinois Supreme Court has given with one hand, and taken away with the other. The *Colson* decision gives more protection to free speech and press, while the *Chapski* decision gives more protection to the plaintiff. The *Colson* decision is somewhat more defensible than the old innocent construction rule was. After all, the Supreme Court gave explicit approval to a state to define its own standard of liability, as long as it did not impose liability without fault. And Illinois is not the only state to require a

136. 92 Ill. 2d 344, 442 N.E.2d 195 (1982).

137. The innocent construction rule was established in John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105 (1962), *cert. denied*, 371 U.S. 877 (1962), where the court stated: "[T]he article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law." *Id.* at 442, 181 N.E.2d at 108.

138. Chicago Lawyer, Dec. 1982, at 5, col. 1.

139. *Id.*

140. Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1065 (1962).

141. 92 Ill. 2d at 351-52, 442 N.E.2d at 198-99.

142. *Id.*

plaintiff to prove actual malice if the published matter is in the public interest.[143] But the *Colson* decision is still unwarranted. As *Chapski* serves to illustrate, Illinois still recognizes a strong interest in protecting an individual's reputation. If the innocent construction rule can be modified to preserve this right, the court should be content to continue to apply the standard advanced and abundantly justified by the *Troman* decision. The *Colson* court's failure to adequately consider the interest of protecting the individual's reputation leads to this anomalous result.

CONCLUSION

The status of Illinois defamation law is unclear after the *Colson* decision. A private individual who brings a defamation suit should try to limit *Colson* to its particular facts. If a media defendant is involved or if there is widespread publication, the plaintiff should argue that *Troman* should be the applicable standard. The private individual should stress Illinois' explicit legislative and judicial recognition of the need to effectively protect private reputational interests. Finally, the plaintiff should emphasize the weaknesses of the case by case approach of *Colson*. Hopefully, these arguments will gain a favorable reception.

143. *See supra* note 11.

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